No. 15,038

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK M. CHICHESTER, Trustee in Bankruptcy of Estate of S. A. Willen Company, a corporation, bankrupt,

Appellant,

vs.

UNION BANK & TRUST CO. OF LOS ANGELES,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

PETITION FOR REHEARING.

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To the Honorable William E. Orr, James Alger Fee, and Richard H. Chambers, Judges of the United States Court of Appeals for the Ninth Circuit:

Frank M. Chichester, Trustee in Bankruptcy of the Estate of S. A. Willen Company, a corporation, bankrupt, Appellant, respectfully presents to this Honorable Court his petition requesting a rehearing in the above entitled cause upon the following grounds:

1. That the Court overlooked the material evidence in holding that the debt which the chattel mortgage

herein secured came into existence on February 20, 1953, whereas the evidence shows it did not come into being until February 24, 1953.

2. That the Court overlooked the argument of Appellant that it was first necessary to pass upon the validity of the escrow herein in order to determine the validity of the chattel mortgage.

3. That in holding that there was a conditional delivery of the chattel mortgage on February 4, 1953, which did not become effective or absolute until February 20, 1953, the Court misconceived the law.

4. That the Court overlooked the argument of Appellant that the chattel mortgage was ineffective as to creditors because of the unreasonable delay between the time of its delivery and the date of its recordation.

PRELIMINARY STATEMENT.

The Referee concluded that the chattel mortgage held by the Appellee bank herein was void because it was made to the bank-mortgagee, which was also acting as escrow holder in the transaction; that the delivery of the chattel mortgage took effect on February 4, 1953 (the date when the escrow was opened); and that since the chattel mortgage was not recorded until sixteen days later on February 20, 1953, its recordation did not operate as a valid lien as to the bankrupt's creditors. The District Court, in setting aside the Referee's decision, found that the delivery of the chattel mortgage was made only conditionally on February 4, 1953, and did not

become absolute until February 20, 1953 when, according to the District Court's finding, the money was paid over to the mortgagor; and said Court further held that in order to determine the validity of the chattel mortgage it was not necessary to decide the question whether the Appellee bank could be an escrow holder and at the same time a party to the transaction; and that the chattel mortgage was a valid lien and, therefore, effective as to the bankrupt's creditors.

In affirming the judgment of the District Court, this Honorable Court, as appears from its *Per Curiam* Opinion, has literally adopted the language of that Court, saying: "We are persuaded that the District Court reached the correct conclusion and that the reasoning employed by it in its Opinion is sound." With this determination Appellant respectfully disagrees, being of the conscientious belief that the District Court's conclusion was incorrect and its reasoning unsound.

GROUNDS FOR REHEARING.

I.

This Court Overlooked the Material Evidence In Holding That the Debt Which the Chattel Mortgage Herein Secured Came Into Existence on February 20, 1953, Whereas the Evidence Shows It Did Not Come Into Being Until February 24, 1953.

The Opinion of this Court upholds the finding of the District Court that the chattel mortgage became effective when the debt which it secured was created, which occurred when the money was paid over by the bank; and that this date was February 20, 1953. In his Opening Brief (p. 28) as well as in his Reply Brief (p. 6) Appellant drew attention to the fact that the money was not advanced until February 24, 1953. If the money was not paid until February 24, 1953, and no debt existed until that date, the chattel mortgage which was recorded on February 20, 1953 could not have been a valid one; for, as this Court's Opinion (p. 2) well says: "If there is no debt, there is no mortgage."

It, therefore, becomes material to ascertain the precise date on which the money was paid over. In order to remove all doubt, Appellant respectfully draws attention to his Opening Brief (pp. 27-28) wherein specific reference is made to Appellee's own Exhibit 5, and the proceedings before the Referee, reproduced as follows:

> "Appellee-petitioner's Exhibit No. 5, three ledger sheets of the *Union Bank and Trust Company re S. A. Willen Company* [R. 73] shows that the money was advanced on February 24, 1953. [R. p. 55]. Quoting from the Reporter's Transcript:
>
> "The Referee: *When was the money paid over?*
>
> Mr. Kornblum: On the 20th day of February.

The Referee: I was looking at the record here. I can't make it out.

Mr. Kornblum: Maybe I shouldn't have let Mr. Lukens go. But the money was paid at the time. There is an escrow and on the 20th day of February —in other words, the bank even took perhaps a longer time than the law requires to give notice to creditors. Now when the—

The Referee: It shows here apparently that the (13) money was advanced on 2-23-54, and—

Mr. Kornblum: And they didn't have to advance it until 2-20.

The Referee: And 2-24—

Mr. Kornblum: That is 1953. There seems to be some confusion in the pleadings. It is 1953.

The Referee: *2-24-53?*

Mr. Kornblum: *That is right.*" (Emphasis added) [R. pp. 54-55].

From the above exchange between the Referee and Mr. Kornblum, representing the Appellee bank, it finally emerged clear that the money was paid over on "2-24-53", Mr. Kornblum assenting in the words, "That is right." Moreover, the ledger sheets aforesaid, introduced in evidence as Appellee-Petitioner's Exhibit No. 5, confirm Mr. Kornblum's assent that February 24, 1953 was the correct date on which the money passed; so that his first reply to the Referee wherein he stated above that it was paid on February 20, 1953, was an obvious error which Mr. Kornblum finally corrected.

Accordingly, Appellant respectfully submits that the finding in the Opinion that the money was paid over on February 20, 1953, is not only not supported by, but is actually contradicted by the evidence.

II.

The Court Overlooked the Argument of Appellant That It Was First Necessary to Pass Upon the Validity of the Escrow Herein in Order to Determine the Validity of the Chattel Mortgage.

This Honorable Court, in upholding the decision of the District Court overlooked the argument of Appellant that the Appellee-bank could not legally be an escrow holder in the instant transaction to which it was a party; and that where, as here, the bank occupied this dual position, the effect was to invalidate the escrow created on February 4, 1953, and in consequence, to bring about an immediate and absolute delivery of the chattel mortgage to the bank, as mortgagee, on that date. It was because the determination of the validity of the escrow was so vitally related to the question whether or not the delivery of the chattel mortgage on February 4, 1953, was a conditional or absolute one, as appears from Point III immediately succeeding Point II herein, that Appellant deemed it necessary for the District Court and this Honorable Court to pass upon the question. Aside from this consideration Appellant believes that the question whether banks may act as escrow holders in transactions in which they are interested parties is of such public importance as to merit serious consideration by this Court; and Appellant accordingly earnestly requests that this Honorable Court pass upon this question.

III.

The Court Misconceived the Law in Holding That There Was Here a Conditional Delivery of the Chattel Mortgage of February 4, 1953 Which Did Not Become Effective Until February 20, 1953.

Adopting the language of the District Court, this Court stated: "The act of the parties clearly indicates that the mortgage was accepted conditionally; the evidence clearly shows that the delivery to the bank on February 4, 1953 was conditional, etc.," that a "chattel mortgage is a contract;" and that "A contract can always be delivered conditionally," citing *Spade v. Cossett,* 10 Cal. App. 2d 782, 243 P. 2d 799 (1952). (Op. p. 2).

Appellant agrees that a contract may be delivered conditionally, subject, however, to the qualification that, if the delivery is to be conditional, *it must be made to a third party, such as an escrow holder.* If a contract is delivered by one of the parties thereto to the other, delivery may not be made conditionally, but it becomes absolute and the party to whom it is delivered "takes" free from the condition. The case of *Spade v. Cossett,* 110 Cal. App. 2d 782, *supra,* cited in the Opinion in support of the proposition that a contract may always be delivered conditionally involves a factual situation in which the delivery of a deposit receipt agreement was made by the seller of real estate to a real estate broker subject to the condition that it was not to be turned over to the purchaser unless the seller's wife agreed to the transaction.

Such a delivery to the broker (a third party) could, of course, be made conditionally. But the holding in the *Spade* case has no application to the instant situation where, in the absence of a valid escrow, the delivery of the chattel mortgage contract was made directly by the mortgagor to the bank *as mortgagee;* and the ruling of this Honorable Court to the contrary is, in Appellant's view, erroneous as a matter of law, as embodied in the applicable provisions of the California Civil Code below.

Section 1626 of the California Civil Code provides as follows:

> "A contract takes effect upon its delivery to the party in whose favor it is made, or to his agent."

Section 1627 of said Code reads as follows:

> "The provisions of the chapter on transfers in general concerning delivery of grants, absolute and conditional, *apply to all written contracts.*" (Emphasis added).

Examining the provisions of the chapter on "Transfers in General", it will be found that the pertinent sections of said Code are Sections 1056 and 1057,

Section 1056 reads as follows:

> "A grant cannot be delivered to the grantee conditionally. Delivery to him or his agent is necessarily absolute *and the instrument takes effect thereupon discharged of any condition on which delivery was made.*" (Emphasis added).

Section 1057 of said Code provides:

> "A grant may be deposited by the grantor *with a third person,* to be delivered on performance of a condition, and, on delivery by the depositary, it will

take effect. *While in the possession of the third person and subject to condition,* it is called an escrow." (Emphasis supplied).

The above Sections 1056 and 1057 apply to all written contracts, under Section 1627 above cited. Accordingly, Sections 1056 and 1057 apply to a chattel mortgage which the Opinion finds to be be a contract. Accordingly, any distinction between a grant and a contract is, in this connection, immaterial.

Since the Opinion of this Court is, in effect, that the validity of the escrow need not be determined, it follows that the escrow may be omitted entirely in determining when the delivery of the chattel mortgage became effective. Since the delivery was made to the bank, *as mortgagee,* on February 4, 1953, it became absolute on that date and the bank took the mortgage *discharged of any condition,* under the provisions of Section 1056 of the Code aforesaid. If, on the other hand, it could be asserted that delivery was made on that date to the bank *as escrow holder* (and not as mortgagee) it would have to be assumed that the escrow was valid, since it cannot be seriously argued that the Civil Code countenances an *invalid* escrow upon which to predicate a valid delivery. Since, as Appellant has consistently maintained, the escrow herein created was invalid, Section 1057 aforesaid is inapplicable; while under Section 1056, a conditional delivery of a contract cannot be made by one party to the other.

Without unduly protracting the discussion of the point that a conditional delivery could not legally have been made on February 4, 1953, to take effect at a later date, Appellant desires to call attention to the only case in Cali-

fornia, his counsel have been able to find, wherein it was held that, under Section 1056 of the California Code a conditional delivery of a written contract could not legally be made by one party to a contract to the other party, and that the attempt so to do in escrow would not be tolerated. In the case of *California Raisin Growers' Association v. Abbott,* 106 Cal. 601, wherein contracts were delivered *conditionally* by members of the Association to the Association (not a third party) the Court, on page 606 said:

> "Even if delivery of the contracts in escrow, with the proviso alleged, *were tolerated* (*and it is not—Civ. Code, Secs. 1056, 1626, 1627*), the acceptance of the terms of the contracts by the producers of raisins, waived the escrow agreement." (Emphasis added).

While it is true, that the question of the applicability of the above cited sections of the Code was not directly presented in the *Raisin Grower's* case, *supra,* it is hardly open to question that, had it been so presented, the Court would have held that delivery of contracts to an escrow holder who was also a party to the transaction would not have been tolerated.

Accordingly, Appellant submits most respectfully that the delivery of the chattel mortgage to the mortgagee bank became absolute on the date of such delivery, namely, February 4, 1953; and that the holding of this Court to the contrary is erroneous as a matter of law.

IV.

The Court Overlooked the Argument of Appellant That the Chattel Mortgage Was Ineffective as to Creditors Because of the Unreasonable Delay Between the Time of Its Delivery and the Date of Its Recordation.

Finally, the Court overlooked the argument of Appellant to the effect that the chattel mortgage, having been delivered to the bank, as mortgagee, on February 4, 1953, the delivery became absolute on that date, and that the chattel mortgage not having been recorded until February 20, 1953, the delay in such recordation rendered the mortgage ineffective as a lien binding on the bankrupt's creditors (Op. Br. pp. 24-32; Rep. Br. pp. 5-6).

Accordingly, Appellant respectfully prays that this Honorable Court will grant a rehearing herein, and upon such rehearing, reverse the judgment of the District Court and uphold the decision of the Referee.

Respectfully submitted,

BROOKS & HOFFENBERG,
GABRIEL HOFFENBERG and
ROBERT N. RICHLAND
By GABRIEL HOFFENBERG,
Attorneys for Appellant.

Certificate of Gabriel Hoffenberg.

State of California, County of Los Angeles—ss.

GABRIEL HOFFENBERG, being duly sworn, deposes and says:

That he is one of the attorneys for the Appellant in the above entitled cause, and that in his conscientious judgment the within Petition for Rehearing is well founded in fact and in law, and that it is not interposed for the purpose of delay.

GABRIEL HOFFENBERG.

Subscribed and sworn to before me this 13th day of February, 1957.

MARGUERITE F. CRIPPS,
Notary Public in and for the said County and State.

My Commission expires January 3, 1960.